

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

STEPHEN MICHAEL BIESZKA,

Defendant-Appellant,

SUPREME COURT NO: 161838

COURT OF APPEALS: 349349

TRIAL COURT: 16-20356-FH

ORG. MSC NO: 156325

ORG. COA NO: 337977

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**PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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QUESTIONS PRESENTED

- I. Michigan Law allows for an exemption from the sex offender registration if certain offenders can prove that they engaged in a consensual sexual act. The Defendant-Appellant presented the lower court with text messages showing a relationship between the victim and himself. The court also heard a statement from the victim stating that the sexual encounter was not consensual. Did the trial court err when it denied the Defendant-Appellant's request for a SORA exception?

Defendant-Appellant's Answer: Yes

Plaintiff-Appellee's Answer: No

Trial Court's Answer: No

Court of Appeals Answered: No

STATEMENT OF JURISDICTION

Plaintiff-Appellee objects to the Defendant-Appellant's statement of jurisdiction. The Michigan Supreme Court has discretion to review a case following a decision of the Court of Appeals only if the decision is clearly erroneous and will cause material injustice, or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals. MCR 7.303(B)(1). The Defendant-Appellant cannot show that the Michigan Supreme Court should have jurisdiction over this application for leave to appeal under MCR 7.305(B). The Court Rules provide that an application for leave to appeal must show the following:

- (1) The issue involves a substantial question about the validity of a legislative act;
- (2) The issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
- (3) The issue involves a legal principle or major significant to the state's jurisprudence;
- (4) In an appeal before a decision of the Court of Appeals,
 - a. Delay in final adjudication is likely to cause substantial harm, or
 - b. The appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute, a rule or regulation included in the Michigan Administrative Cod, or any other action of the legislative or executive branches of state government is invalid;
- (5) In an appeal of a decision of the Court of Appeals,
 - a. The decision is clearly erroneous and will cause material injustice, or

b. The decision conflicts with a Supreme Court decision or another decision of the Court of Appeals; or

(6) In an appeal from the Attorney Discipline Board, the decision is clearly erroneous and will cause material injustice.

MCR 7.305(B)

The Defendant-Appellant claims that his Application for Leave to Appeal falls under MCR 7.305(B)(5)(a), that the decision of the Court of Appeals is clearly erroneous and will cause material injustice. However, the Defendant-Appellant has failed to show that the Court of Appeals' decision was clearly erroneous. Therefore, the Plaintiff-Appellee objects to the Defendant-Appellant's statement of jurisdiction.

COUNTER-STATEMENT OF FACTS

The Defendant-Appellant entered a plea to Assault with Intent to Commit Sexual Penetration in November 2016. Thereafter, the Defendant was set for sentencing and the trial court heard the Defendant-Appellant's motions on exemption from registration under SORA and for HYTA. At the hearing, the court heard testimony from the Defendant-Appellant and his father. The Defendant-Appellant testified that he had been invited over to the victim's house and they were texting over Facebook about sex. (Sentencing, 10). He stated, "It seemed as if she was very in to me as if she wanted me." *Id.* He claimed that he asked the victim if she wanted this and she nodded her head and said "yes." *Id.* at 11. At that point, there was no sexual encounter. Instead, the Defendant-Appellant went home on his bicycle and ran back to the victim's house. *Id.* at 12. He testified he then went into the victim's house, the victim led him to her bedroom, and they took off each other's clothes and had the sexual interaction. *Id.* The Defendant-Appellant stated that to his understanding, she was a willing participant in the sexual acts. *Id.* He claimed that if she had said no or told him to stop, he would have stopped immediately. *Id.*

On cross-examination, the Defendant-Appellant was questioned about his text messages with another minor regarding sexual acts. Those text messages included a text asking, "If I said I wouldn't mind you hugging me and doing a reach around and tug me off, would that turn you on?" *Id.* at 17. Later, the Defendant-Appellant stated that there was no intent to act on these text messages, it was just high schoolers talking. *Id.* at 25.

The Defendant-Appellant's father also testified at the sentencing hearing. His testimony was in reference to the night he found out about the sexual encounter between his son and the victim. *Id.* at 34. He explained that the victim's mother came over to his house to talk about it. *Id.* He then relayed what the victim's mother told him, including how the victim's father has a temper. *Id.* at 35. He also confirmed that he was not present at the time of the sexual encounter. *Id.* at 36–37. While he claimed that he had personal knowledge on the issue of consent based on the text messages, it was cleared up by the court that the Defendant-Appellant's father did not have any personal knowledge regarding the victim's consent to the sexual act. *Id.* at 37–38.

Following this testimony, the prosecutor read a statement from the victim. She started, "I want you to know that what happened the day of the attack was uninvited, unwanted, violent, perverted and devastating." *Id.* at 46. The statement continued, "I did not want him there and I did not want him to do anything that he did that day, or the horrible things he did after or following the attack." *Id.* She explained that she told him to stop several times and to leave, but he wouldn't. *Id.* at 47.

The victim told her version of the incident in graphic detail:

He pushed me down and took off all my clothes. I hit and kicked him to try and get him away. He took his clothes off and held my wrists so tight I thought he was going to break them. He forced my legs to fold so that my knees were pinned against my shoulders. When he was trying to pine [sic] me, I was kicking him and pushing him away. At some point he hit me hard in the stomach and I kicked him under the chin. He grabbed my bottom once he had me pinned and was on top of me so I couldn't move. He was kissing me and shoving his tongue down my

throat. He put his hands all over my body, like my chest, bottom, stomach and back. I kept crying and telling him to stop and that I didn't want him to do that. At one point he said "why not?" and I said "Because I don't," but he would not stop.

I was scared because there was no one home to help me, and I was afraid because I was worried that if he got upset, I wasn't sure what he would do to me. He forced his penis in my vagina in a way that hurt me so bad it felt like I was being sliced in two. He also put his fingers and tongue in my vagina, and was biting me. At one point he roughly grabbed me up by my throat, choked me and forced his penis down my throat, making me gag and choke and gasp for air. He ejaculated in my face on purpose, which got in my eye. I told him my dad would be home at 5:00 p.m. to try to get him to leave. He looked scared when I said that and got very nervous. He rushed around and left in a hurry.

As soon as he left my room I reached for my phone. He hadn't left the house yet, so he saw me reach for my phone and came back into my room angry. He slapped my phone out of my hand and hit me in the face. He said "I could go to jail for what I did, so if you tell anyone I will come back and hurt you worse than this." He also threatened to come back and hurt my younger sister Ashley, who was only 12 years old at the time.

(Sentencing, 46–49).

After the trial court heard the testimony and arguments of the attorneys at the sentencing hearing, the judge declined to issue a ruling from the bench and instead provided a written order after fully reviewing the evidence presented.

(Sentencing, 64). The trial court's order stated that the Defendant failed to rebut the victim's statements and testimony that clearly described non-consensual conduct citing the victim's preliminary hearing testimony and her statement at the sentencing hearing. The court explained that the "action of 'casing' the victim's house during the first visit and abandoning his bicycle at his own house before the second assaultive visit strongly suggests a consciousness by Defendant that his

presence and sexual behavior was not voluntarily accepted by the victim.” (Trial Court’s Order Feb 28, 2017, p 2).

The Defendant-Appellant filed a motion for reconsideration which was also denied. He then appealed the lower court’s decision on his motion for reconsideration. The Court of Appeals denied his delayed application for leave to appeal. The Defendant-Appellant then filed an application for leave to appeal with the Michigan Supreme Court. The Court issued an Order vacating the trial court’s ruling and remanding the case back to the circuit court to issue a written ruling and to specifically consider the text messages in determining if MCL 28.728c(14) should apply.

On remand, the trial court considered the text messages and again denied the Defendant-Appellant’s petition for exemption from the registration requirements of the Michigan Sex Offender Registration Act (SORA). The trial court stated that it found the victim’s testimony regarding consent to be more credible than that of the Defendant. Regarding the text messages, the trial court stated that they established, at most, a romantic relationship between the victim and the Defendant. However, they did not reference consent in respect to the incident that lead to the Defendant’s conviction. The Defendant-Appellant’s appeal on the trial court’s order was denied by the Michigan Court of Appeals in an opinion issued June 18, 2020. The Court of Appeals stated, “Based on the record evidence, the trial court’s determination that defendant failed to demonstrate by a preponderance of the evidence that the victim consented to the sexual act at issue does not leave us ‘with

a definite and firm conviction that a mistake has been made' and therefore was not clearly erroneous.” (COA opinion, 6, internal citation omitted). The Defendant-Appellant now files an application for leave to appeal with the Michigan Supreme Court.

ARGUMENT

I. Standard of Review

A lower court's decision regarding a petition for exemption from SORA requirements is reviewed for clear error. *People v Hesch*, 278 Mich App 188 (2008). "A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *Id.*; citing *Szymanski v Brown*, 221 Mich App 423, 436 (1997).

II. The Court of Appeals did not err when it affirmed the trial court's decision.

The Defendant-Appellant claims that the Court of Appeals erred when it affirmed the trial court's decision to deny his petition for exemption from SORA. MCL 28.728c(14) allows a tier III offender to petition the court for an order allowing him to discontinue registration if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the defendant and the victim and 1) the victim was 13 years of age or older but less than 16 years of age at the time of the offense, and 2) the defendant is not more than four years older than the victim. The Legislature intended MCL 28.728c(14) as a "consent exception for certain offenders who can prove that they engaged in a consensual sexual act." *People v Temelkoski* (on remand), 307 Mich App 241, 255 (2014).

The procedure for requesting a SORA exemption is set forth in MCL 28.723a. The statute states, in pertinent part, that "[t]he individual has the burden of proving by a preponderance of the evidence in a hearing under this section that his or her conduct falls within the exceptions described in subsection (1) and that he or

she is therefore not required to register under this act.” MCL 28.723a(2). The burden is on the Defendant to prove by a preponderance of the evidence that the sexual act was consensual. *People v Cloverdill*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2014 (Docket No. 313679) (Attachment 1). Preponderance of the evidence “means such evidence, as when weighed with that opposed to it, has more convincing force and the greater probability of truth. *People v Cross*, 281 Mich App 737, 740 (2008).

Defendant-Appellant continually claims that the text messages between the victim and himself support his claim that the sexual encounter was consensual. The Court of Appeals explained that the text messages that the Defendant-Appellant heavily bases his claims of error on are “vague in nature, contain no reference to the incident for which defendant was convicted, and have little discernable substantive value relevant to the issues presented in this appeal.” COA opinion, 5.

The texts show nothing more than a romantic relationship. Simply because proof of a consensual relationship has been established, it does not automatically prove that every sexual encounter was consensual. As the Court of Appeals noted, “even accepting the defendant’s assertion of a ‘consensual relationship’ as true, it does not automatically follow that every sexual activity was consensual.” COA opinion, 6. Furthermore, Defendant-Appellant’s fixation on the text messages completely ignores the other evidence presented to the trial court, including the victim’s preliminary examination hearing testimony and impact letter.

The other major flaw in Defendant-Appellant's argument is his own testimony at the sentencing hearing. During his testimony, the Defendant-Appellant admits to also texting another minor which include sexual references. The text message exchange includes a text that states, "If I said I wouldn't mind you hugging me and doing a reach around and tug me off, would that turn you on." (Sentencing, 17). The Defendant-Appellant testified that his text message meant "the girl would reach around, would hug from behind and then proceed to jerk the person off." *Id.* Later, when the Defendant's counsel questioned him about these text messages, the Defendant-Appellant indicated that he would not act on those texts if he were to come in contact with the minor.

Q: What do you think the communications you had after this episode with Sarah, what do you think the communications with Kenzie Hooker mean? What's-what does that tell us about your character from your own perception?

A: From what-from my perception I believe it was just texting, it was just high schoolers talking. There was no inten[t] behind any of the actions. It was just talking.

Q: So, if you had encountered Kelsie (sic) Hooker the day after that communication about the reach around, you would not have even remotely considered allowing Kelsie (sic) Hooker to do a reach around procedure on you.

A: I would not think of it at all.

Q: You wouldn't think about it and you wouldn't do it.

A: I wouldn't do it.

(Sentencing, 25).

It is fairly clear from the Defendant-Appellant's testimony that he understands that simply texting about a sexual act does not equate to consenting in the actual physical act.

The Defendant-Appellant also makes the broad, and somewhat concerning, overgeneralization that it is "universally understood that with the majority of these romantic high school relationships there is some kind of sexual type component." (Defendant-Appellant's Br, 18). The Defendant makes this bold claim without any data regarding teenage sexual relationships to back his claim. It is quite concerning that Defendant-Appellant would conclude, without any supporting data, that it is universally understood that a majority of 14 year olds are having consensual sexual relationships. Moreover, this does not prove that the victim in this particular case consented to the sexual encounter between her and the Defendant-Appellant. Even if the Defendant-Appellant's unsupported assertions regarding high school relationships are somehow true, it doesn't automatically mean that this particular sexual act was consensual.

The trial court heard two very different versions of what occurred that day and was tasked with determining which witness was more credible when it came to the issue of consent. Ultimately, the trial court, using the factors listed in Michigan Criminal Jury Instruction 3.6 (witness credibility), found that the victim's testimony was more credible based on the detail provided in her testimony and consistent details provided in her written statement. The trial court also indicated that while both witnesses may have reason to lie about the issue, Defendant's

incentive to lie (to avoid sex offender registration) outweighed the victim's incentive to lie (disappointing her parents).

The testimony that the trial court heard from the Defendant-Appellant regarding consent was that the Defendant-Appellant asked the victim if this is what she wanted and she indicated she did. (Sentencing, 11). Then he went back home and then came back to the victim's house before the sexual act occurred. *Id.* at 11–12. He also stated the victim was willing the whole time and that he would have stopped if she had asked him to. *Id.* at 12. And, he stated that he believed the entire sexual encounter was consensual. *Id.* at 13.

The victim painted a tremendously different picture for the court through her preliminary examination hearing testimony and her statement read at sentencing. At the preliminary examination hearing the victim testified that the Defendant-Appellant pushed her into her room, took off her clothes, and forced himself on her. (Preliminary Hearing, 10). She testified that she told him “no,” but he did not stop. *Id.* at 11, 13. Her statement at sentencing supported her preliminary hearing testimony. She stated that the sexual act was *uninvited, unwanted, violent, perverted and devastating.*” (Sentencing, 46). The statement continued, “I did not want him there and I did not want him to do anything that he did that day, or the horrible things he did after or following the attack.” *Id.* She also stated, “I kept crying and telling him to stop and that I didn’t want him to do that. At one point he said ‘why not?’ and I said ‘Because I don’t,’ but he would not stop.” *Id.*

The Defendant-Appellant claims that the victim's testimony is not as credible as his for several reasons. First, he claims that the victim's testimony is not as credible because her story changed. The Defendant-Appellant has claimed that the victim's letter to the court regarding sentencing gave graphic detail about the sexual assault but her preliminary hearing testimony did not give such details. However, as noted by the prosecutor during sentencing, the victim's preliminary hearing testimony was more of a top-level review of what happened to show probable cause. Not every detail was hashed out during that hearing because it was not necessary to have the victim recreate the scene for a probable cause determination. (Sentencing, 62).

Next, the Defendant-Appellant claims that the victim's testimony is not credible because her father had a temper, so she made up the story that the sexual act was nonconsensual. The Defendant-Appellant provides no proof of this aside from his own speculation and his father's speculation. As noted by the prosecutor and the trial court on several occasions, the Defendant-Appellant's father was not present during the sexual encounter. His father's testimony is irrelevant when it comes to the issue of consent. Simply because he believes the victim's father has a temper, it does not prove that the victim consented or that she is making up a story to avoid possibly disappointing her parents. The testimony is simply speculation and the trial court did not err when it did not give it much weight.

The trial court determines credibility. "When reviewing challenges to the sufficiency of the evidence, this Court must not interfere with the fact-finder's role

in deciding the weight and credibility to give to a witness's testimony—"no matter how inconsistent or vague that testimony might be." *People v McFarlane*, 325 Mich App 507, 514 (2018), citing *People v Mehall*, 454 Mich 1, 6 (1997). Defendant-Appellant concedes that under normal circumstances this Court will not interfere with the trier of fact's role in determining the credibility of witnesses. However, the Defendant-Appellant claims that this Court should reevaluate the trial court's credibility determinations in this case because it was "not only erroneous and clearly against the great weight of the evidence but completely inappropriate in view of the text messages." (Defendant-Appellant's Br, 21).

The text messages do not make the lower court's determinations on credibility inappropriate. As noted by both the trial court and the Court of Appeals, the text messages show nothing more than a romantic relationship. The Defendant-Appellant attempts to use those vague text messages to conclude that a sexual relationship was universally understood. But, the lower court's decision is not inappropriate. The text messages simply do not say or prove what the Defendant-Appellant suggests they do.

The Defendant-Appellant argues that the Court of Appeals is attempting to create a "yes means yes" law in Michigan. He claims that the text messages support the understanding that a romantic high school relationship existed and therefore there was a sexual component. However, this is clearly not the intent of the Court of Appeals. The argument regarding a "yes means yes" law is irrelevant in this case because the victim so clearly articulated that the sexual encounter was

not consensual. Had the victim merely stayed silent throughout the proceedings, this argument may be relevant. But, given the facts presented to the lower courts, it was clear that the victim verbalized her unwillingness to participate in the sexual act. She repeatedly stated throughout the proceedings that the sexual encounter was not consensual. Therefore, the Defendant-Appellant's argument regarding the creation of a "yes means yes" law is irrelevant to this case.

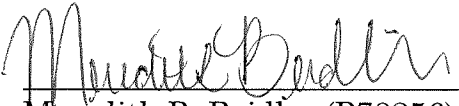
CONCLUSION AND RELIEF REQUESTED

The Court of Appeals did not err when it affirmed the trial court's decision regarding the Defendant-Appellant's petition for removal from SORA registration. Based on the testimony of the victim and her impact statement, it was clear to the trial court that the sexual encounter was not consensual. Furthermore, the Defendant-Appellant's reliance on the text messages is unfounded. The text messages establish nothing more than a romantic relationship and do not provide any insight into the issue of consent to the sexual act.

Therefore, the Plaintiff-Appellee respectfully requests this Court affirm the decisions of the trial court and the Court of Appeals.

Dated: September 4, 2020

Respectfully submitted,


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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

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STEPHEN MICHAEL BIESZKA,

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**PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

ATTACHMENT 1

*(People v Coverdill, unpublished per curiam opinion of the Court of Appeal, issued
May 22, 2014 (Docket No. 313679))*

2014 WL 2159465

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of
Michigan, Plaintiff–Appellee,
v.

Scott James COVERDILL, a/k/a Scott
James Ballard, Defendant–Appellant.

Docket No. 313679.

May 22, 2014.

Oakland Circuit Court; LC No.2003–190195–FH.

Before: BORRELLO, P.J., and WHITBECK and K.F.
KELLY, JJ.

Opinion

PER CURIAM.

*1 Defendant appeals by leave granted¹ the order denying defendant's petition to discontinue sex offender registration. Finding no errors requiring reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On April 7, 2003, defendant, an 18 year old high school senior, attended a party in Holly, Michigan. Also at the party was the 14–year–old complainant, who was a freshman at Holly High School. The two eventually engaged in sexual intercourse inside defendant's vehicle. The complainant later told a friend what happened and the police investigated the matter. Ultimately, defendant pleaded guilty to third-degree criminal sexual conduct (CSC III) pursuant to MCL 750.520d(1)(a) (sexual penetration with a person at least 13 years of age and under 16 years of age). As a result of defendant's guilty plea, he was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, and was sentenced to 1,095 days in the Michigan Department of

Corrections. Defendant was also required to register as a sex offender under the Sex Offender Registry Act (SORA), MCL 28.721 *et seq.* After serving three years in prison, defendant earned HYTA dismissal and was released; however, he was still required to register as a sex offender for life.

In 2011, defendant filed a petition requesting removal from the sex offender's registry, arguing that the conduct at issue was consensual and that continued registration was cruel and unusual punishment. After a three-day evidentiary hearing, the trial court rejected both arguments and ordered that SORA registration continue. Defendant now appeals by leave granted.

II. ANALYSIS

1. PROOF OF CONSENT

Defendant argues that the trial court erred in determining that he failed to prove that the sexual intercourse was consensual by a preponderance of the evidence. We disagree.

The lower court's findings of fact with regard to a defendant's petition for removal from the sex offender registry are reviewed for clear error. *People v. Hesch*, 278 Mich.App 188, 192; 749 NW2d 267 (2008). “A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made.” *Id.* (internal quotation marks omitted). “This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses.” *People v. Williams*, 268 Mich.App 416, 419; 707 NW2d 624 (2005).

Under MCL 750.520d(1)(a), a person is guilty of CSC III if the person engages in sexual penetration with another person that is at least 13 years of age and under 16 years of age.

An individual classified as a tier III offender² who meets the requirements of MCL 28.728c(14) may petition the court for an order allowing him to discontinue registration under this act. MCL 28.728c(3). Pursuant to MCL 28.728c(14), the court shall grant a petition under MCL 28.728c(3) “if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim,” and all of the following apply:

*2 (i) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.

(ii) The petitioner is not more than 4 years older than the victim.

At issue in this case is whether there was “a consensual sexual act.” Consent “impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither ‘mentally defective’, ... ‘mentally incapacitated’, ... nor ‘physically helpless,’ ... is not criminal sexual conduct.” *People v. Bayer*, 279 Mich.App 49, 67; 756 NW2d 242 (2008), judgment vacated in part on other grounds 482 Mich. 1000 (2008), quoting *People v. Khan*, 80 Mich.App 605, 619 n. 5; 264 NW2d 360 (1978). Physically helpless in terms of criminal sexual conduct “means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.” MCL 750.520a(m).

As a result of defendant's guilty plea under MCL 750.520d(1) (a), an offense not specifically requiring force or coercion, the matter of consent was not determined. The parties agreed that the burden was on defendant to prove by a preponderance of the evidence that the sexual act was consensual. Preponderance of the evidence “means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.” *People v. Cross*, 281 Mich.App 737, 740; 760 NW2d 314 (2008).

Defendant testified that the complainant was not so intoxicated that she failed to consent. He testified that the complainant put her hand on his upper thigh and asked him if he “wanted to,” she never told him “no” or “stop,” and even suggested sexual positions. However, there was also evidence that the complainant was physically unable to communicate unwillingness to engage in sexual intercourse. The complainant testified that she drank mixed vodka drinks at first, and then started drinking vodka straight from the bottle. She testified that she fell down in the living room and vomited because she was “incredibly intoxicated.” The complainant testified that when the party ended, she was too drunk to walk and assumed she was carried out to defendant's truck. Her recollection of what happened inside defendant's truck was “fairly limited.” The complainant testified that she was going in and out of consciousness and remembered defendant on top of her with his shirt unbuttoned. The complainant was adamant that she did not consent, and did not have the ability to tell defendant to stop. She stated, “I believe that I was passed out and too inebriated to consent [to sexual intercourse].” Additionally, the complainant had a blood alcohol level of .033 approximately three to four hours after she stopped consuming alcohol.

The trial court concluded that defendant had not proved by a preponderance of the evidence that the sexual act was consensual:

From the hearing, evidence is persuasive and somewhat relevant that petitioner had a reputation for promiscuity and actually was promiscuous. Evidence is persuasive and somewhat relevant that the [complainant] exhibited signs, if not of consent itself, precursors to it, i.e., sexual gestures by the only female at the party that is—been referenced to in this hearing.

* * *

*3 There is a lot with [the complainant's] testimony that leaves this Court skeptical of her, and that skepticism is itself evaluated in light of her age, maturity, and mental health in 2003. The Court is no more persuaded than unpersuaded that its skepticism today is a consequence of her dishonesty than of these other factors. If [the complainant] had the burden of proof to prove she was forced or coerced, or if she had to disprove that she consented, she would fail.

Petitioner, however, has the burden of proof. This Court does not know by a preponderance of the evidence if she consented. For all this Court knows, she did say all the things petitioner attributes to her. For all it knows, she didn't. For all the Court knows, despite her forlornness in 2003 caused by her parents or otherwise, she was possessed of mental liberty. For all it knows, she was not. For all the Court knows, despite her tender years, despite and maybe ... her parents' cavalier implicit acquiescence with her being the only female at a party of teenage males, and she at the budding age of 14 no less, for all the Court knows, despite all this, she was mature enough to consent. For all it knows, she wasn't. It's a wash, and therefore, petitioner having the burden of proof, has not met it for this Court to find consent. Given that the burden of proof was on defendant, the court's findings regarding credibility and conclusion that defendant failed to prove consent by a preponderance of the evidence was not clearly erroneous. *Hesch*, 278 Mich.App at 192.

2. CRUEL AND UNUSUAL PUNISHMENT

Defendant next contends that the registration requirement under SORA, as applied to him, constitutes a cruel and unusual punishment. We disagree.

This Court reviews constitutional issues de novo. *People v. Fonville*, 291 Mich.App 363, 376; 804 NW2d 878 (2011). “Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *People v. Lueth*, 253 Mich.App 670, 675; 660 NW2d 322 (2002). The party challenging a statute has the burden of proving its invalidity. *People v. Thomas*, 201 Mich.App 111, 117; 505 NW2d 873 (1993).

The United States Constitution prohibits cruel *and* unusual punishment. US Const, Am VIII. The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, and if a punishment “passes muster under the state constitution, then it necessarily passes muster under the federal constitution.” *People v. Benton*, 294 Mich.App 191, 204; 817 NW2d 599 (2011), quoting *People v. Nunez*, 242 Mich.App 610, 618–619 n. 2; 619 NW2d 550 (2000).

Defendant relies on this Court's decision in *People v. DiPiazza*, 286 Mich.App 137; 778 NW2d 264 (2009). In *DiPiazza*, the defendant was 18 years old when he had a consensual sexual relationship with another teenager nearly 15 years old. *Id.* at 139–140. The parents of the 15 year old condoned the relationship; however, the school reported it. *Id.* at 154. The defendant was adjudicated under the HYTA, MCL 762.11, for attempted CSC III, MCL 750.520d(1)(a), and successfully completed the terms of his probation. *Id.* at 140. The defendant later married the other teenager and was unable to find employment due to the sex offender registration. *Id.* at 154. The defendant petitioned the circuit court asking that his name be removed from the sex offender's registry because the requirement, as applied to him, constituted cruel and unusual punishment. *Id.* at 140. This Court, “after considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation, conclude[d] that requiring defendant to register as a sex

offender for 10 years is cruel or unusual punishment.” *Id.* at 156.

*4 The facts in the instant case are distinguishable from *DiPiazza*. The trial court found that defendant failed to prove by a preponderance of the evidence that the sexual act was consensual. Moreover, the Michigan Legislature, on July 1, 2011, amended SORA to provide a defendant assigned to HYTA before October 1, 2004, relief in a situation in which the sexual act was consensual. MCL 28.728c(14). As a result of the 2011 amendment, SORA allows an individual who was assigned to HYTA before October 1, 2004, to petition the court for removal from the sex offender registry, and if the court determines that the conviction for the listed offense, i.e., MCL 750.520d(1)(a), “was the result of a consensual sexual act between the petitioner and the victim,” that it shall grant the petition. MCL 28.728c(14). This amendment specifically addresses transgressions involving consensual sex during a “Romeo and Juliet” relationship, as analyzed by the *DiPiazza* Court before the enactment of the amendment.

Because the 2011 SORA amendment appears to have been enacted to prevent individuals assigned to youthful trainee status before October 1, 2004, from remaining on the public sex offender registry if engaged in a consensual relationship, and defendant does not fall within the scope of this provision, the registration requirements of SORA do not constitute a punishment as applied to defendant.

Affirmed.

BORRELLO, J. (concurring).
I concur in result only.

All Citations

Not Reported in N.W.2d, 2014 WL 2159465

Footnotes

- 1 *People v. Coverdill*, unpublished order of the Court of Appeals, entered September 20, 2013 (Docket No. 313697).
- 2 Third-degree CSC, MCL 750.520d, is a “Tier III offense.” MCL 28.722(w)(iv).